

Supreme Court of the United States

L. VOGELSTEIN & COMPANY, INC.,
Appellant,
vs.

THE UNITED STATES.

No. 269.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

This is an appeal by claimant from a judgment dismissing its petition on the merits, after argument and submission of the case on the proofs. The Court below based its decision upon the Findings of Fact, without rendering an opinion (Transcript of Record, pp. 7-19).

Claimant brought this suit to recover fair and just compensation for 12,542,857 pounds of copper, taken from it by the United States for war purposes. The issues are whether or not the United States ordered and took this copper, and compelled claimant to deliver it, and whether or not claimant is entitled to recover the difference between the amount received from the United States and the actual cost to claimant of said copper.

Statement of Case.

In 1917 and 1918, claimant, a New York corporation was a dealer in metals. It was not a mine owner, producer or refiner, but restricted its activities to buying, refining and selling (Finding II, R. p. 7). At the close of business on September 20, 1917, it had on hand 43,851,042 pounds of copper, which had cost it \$11,798,027, making, the average cost thereof per pound 26.881977 cents. Of this amount of copper, 31,308,183 pounds had been sold for future delivery, and there remained unsold and in the ownership of claimant 12,542,857 pounds. This was all bulk copper at the refinery (Findings III, IV, R. p. 8).

On September 21, 1917, the price of copper was fixed by announcement of the President of the United States, after conference with the producers of copper (of whom claimant was not one), at 23½ cents per pound (Finding V, R. pp. 8, 9; Finding VII, R. p. 12). Thereafter on September 28, 1917, a meeting was called in New York City of the copper producers and dealers of the country, at which claimant was represented and at which a Copper Producers' Committee was formed. That Committee was created to co-operate with the War Industries Board and the Council of National Defense, by allocating orders from the United States for copper to the various producers and dealers who were to be called on to supply it for war purposes (Finding VI, R. pp. 9-11). Eugene Meyer, Jr., was there present as a representative of the United States, and had with him a number of commandeering orders for copper, signed by the Secretary of War and drawn up under the provisions *inter alia* of §§ 120 and 123 of the National Defense Act of June 3, 1916. Two of these, for 1,000,000 pounds of copper each, he handed to the claimant (Finding VII, R.

p. 11). It was arranged that the copper named in said requisitions would be obtained in the usual way through contracts between the United States and the United Metals Selling Company, which were entered into from time to time beginning April 6, 1917 (Finding VII, R. p. 11; Finding VIII, R. p. 12). The United Metals Selling Company "in its business confined itself almost exclusively to acting as sales agent for copper-producing companies" (Finding XII, R. p. 18).

At said meeting, it was made clear that the United States was controlling all the copper in the country and would compel delivery thereof for war purposes as required; and in a public document, written and submitted to the President of the United States at his request by Bernard M. Baruch, chairman of the War Industries Board, the control of all copper by the Government at that time and during the war is described. The Court of Claims did not make any finding as to such control of copper. The uncontradicted evidence of that control, including the pertinent portions of Mr. Baruch's report, is contained in the papers on claimant's motion to remand for further findings which has been reserved by this Court for consideration in connection with the whole case on the merits (Findings VI, VII, R. pp. 10, 12; Motion to Remand, pp. 1-5, 36-40, 64-74).

The copper demanded by said two commandeering orders was actually furnished by claimant to the United States (and used by it for war purposes), through the intermediary services of the United Metals Selling Company and according to the Government's plan of acquiring copper for the War and Navy Departments. In the carrying out of that plan, the agencies employed by the United States, in addition to its War and Navy Depart-

ments, were the Council of National Defense, and its subordinate body the War Industries Board, said Copper Producers' Committee, and the United Metals Selling Company. (Findings V-VII, IX, R. pp. 8-10, 17.)

Express contracts were made between the United States and the United Metals Selling Company, and the orders for copper were sent directly to that company by the War or Navy Department. Each such order was handed to the Copper Producers' Committee, which returned it with the name of the producer or dealer, on whom the order should be made, endorsed thereon. Thereupon the United Metals Selling Company placed its own order with the producer or dealer named by said Committee, requesting it to 'please ship' a certain number of pounds of copper to a designated party, on attached Government bills of lading, giving the numbers of such bills, and also the number of the contract with the Government against which the order was issued, and stating the price to be 23½ cents per pound (Findings, VIII-XIII, R. pp. 12-18).

In accordance with this plan of procurement claimant supplied, between September 21, 1917, and February 1, 1918, to the United States for war purposes, the 12,542,857 pounds of copper which cost it 26.881977 cents per pound (Finding XI, R. pp. 17, 18). For all of this copper claimant received from the United States, through the United Metals Selling Company, 23½ cents per pound; and its present claim is that it should recover the difference between the amount thus received and the actual cost to it of the copper, namely, \$424,196.54 (R. pp. 5, 18).

Claimant did not object to complying with the requirements of the United States after September 21, 1917, as

to the method of furnishing copper through the agency of the United Metals Selling Company; and at said meeting on September 28, 1917, it did not object to the price fixed by the Government (Finding VI, R. p. 11). It does not appear that such price or any price was mentioned at that meeting. Claimant did protest, however, against receiving no more than $23\frac{1}{2}$ cents per pound for the 12,542,857 pounds, which had necessarily cost it 26.881977 cents per pound and which had been purchased under compelling long-term contracts. As to these protests there are no findings, although clear evidence of them below is uncontradicted. (Motion, pp. 3, 4; 54-64.) As to such facts claimant, before the announcement of the judgment of the Court of Claims, made requests for specific findings of fact by that Court substantially in the form set forth in the pending motion to remand at pp. 3, 4, 54-64, and reiterated the same, not only in its motion for a rehearing, but also in its filed exceptions to the order of that Court overruling such motion.

May the facts set forth in those motion papers, especially as summarized at pp. 1-5 thereof, be treated as a part of this statement. They show:—

That claimant was compelled to hand over the 12,542,857 pounds of copper to or for the United States;

That claimant protested against receiving only $23\frac{1}{2}$ cents per pound for that copper;

That claimant unavoidably had that quantity on hand at the necessary cost to itself of 26.881977 cents per pound on the 21st day of September, 1917, when the price of copper was fixed by the Government.

Since that average cost price was manifestly higher

than the price which the Government would fix, claimant's vendors under the controlling long-term contracts forced it to take copper rapidly and so to have on hand and unsold the 12,542,857 pounds. Claimant insists that it would not have been put in this position but for the imminence of the governmental fixing of price. It could have avoided this result if it had been a producer. It was the only large dealer who was compelled thus to take rapidly and was unable to sell as fast. Its position was and is unique.

Claimant is compelled to insist here that the findings as contained in the Transcript of Record may lead to erroneous conclusions, and that claimant is fairly entitled to the additional findings requested in said motion.

It is respectfully submitted that the judgment below should be reversed *even on the findings already made*, and that this certainly should be done with the aid of the additional findings sought by the motion.

Assignments of Error.

Appellant says that the Court of Claims made the following errors:—

1. In deciding, as a Conclusion of Law, that claimant is not entitled to recovery, and that its petition should be dismissed.
2. In refusing to make additional findings of fact as to matters indicated in claimant's motion to remand.
3. In finding as a fact that "after September 20, 1917, the market price of copper was 23½ cents per pound".

ARGUMENT.

I.

Claimant did not make any express contract for the sale of the 12,542,857 pounds of copper, for fair and just compensation for which this action is brought.

The recovery in this action must be based on an *implied* contract—between claimant and the United States.

U. S. Judicial Code, §145;

United States v. North American Co., 253 U. S. 330.

No express contract made by claimant is either pleaded or found. If such a contract could possibly exist, it would have to be between claimant and either (1) the United States, or (2) the United Metals Selling Company.

(1)

There was no express contract between claimant and the United States.

Not only is no such express contract pleaded, or found, but Findings of Fact VIII-XI (R. pp. 12-18) show that none could have existed.

“During the period from September 21, 1917, to February 1, 1918, the plaintiff shipped through the said Refining Company to the parties named by said Selling Company in its orders, among other copper the 12,542,857 pounds which remained unsold in its possession and ownership as described in Finding No. II.” (Finding “XI”, R. top p. 18.)

Claimant's insistence is that this procedure occurred in the execution of an *implied* contract between it and the

Government. This Finding simply describes the culmination of the procedure, and nullifies the possibility of any *express* contract between claimant and the United States.

(2)

There was no express contract between claimant and the United Metals Selling Company.

No such contract is pleaded; none is found. The only express contracts were between the Government and the United Metals Selling Company; and all subcontracts made by the latter were required to have inserted in them a statement "that it relates to a 'main contract' between the contractor and the United States" (Finding VIII, R. middle of p. 15). No such subcontract was ever made with respect to the copper acquired from claimant. The procedure, so far as the United Metals Selling Company was concerned, was as follows (Findings IX, XI)—order for copper for War or Navy Department placed by United Metals Selling Company with claimant; then order issued by claimant to the United States Metals Refining Company (claimant's refinery) to ship the copper thus ordered; *Government* bills of lading sent with both orders; the required copper shipped by United States Metals Refining Company on those bills of lading; receipt by claimant from United Metals Selling Company of 23½ cents per pound.

That procedure did not constitute nor show an *express* contract for copper.

In the absence of any *express* contract by or with claimant, the case at bar is distinguished from the recent cases, in which this Court has held the claimant to be precluded from recovery by an express agreement as to compensation, such as

American Smelting & Refining Co. v. United States, 258 U. S.—; No. 221 October Term 1921, decided May 15, 1922;

Duesenberg Motors Corporation v. The United States, 259 U. S.—; No. 80 October Term 1922, decided November 13, 1922.

When the United States ordered and took claimant's copper for war purposes, it impliedly promised and contracted to make fair and just compensation,—not only "just" compensation, which is the wording of the Fifth Amendment of the Constitution, but also fair compensation, in full satisfaction of claimant's loss. When Section 120 of the National Defense Act was passed, with its plenary powers for immediate governmental acquisition of property for war purposes, it was manifestly intended to go beyond the constructions already put on the word "just" as found in the Constitution, and to provide that in the broadest and most equitable sense he whose property was taken should be fairly and fully, as well as justly, compensated.

U. S. Judicial Code, § 145;

United States v. North American Co., 253 U. S. 330, 333;

Tempel v. United States, 248 U. S. 121, 129;

United States v. Lynah, 188 U. S. 445, 462;

United States v. Great Falls Manufacturing Company, 112 U. S. 645, 658;

Langford v. United States, 101 U. S. 341.

II.

The commandeering orders handed to claimant on the 28th day of September, 1917, were and remained mandatory.

Those two commandeering orders, each for 1,000,000 pounds, one of which is quoted in the record (R. pp. 11, 12), specifically provide that the President "hereby places an order with you", not only in the exercise of all the powers that he has to do so, but especially "under the provisions of the Act providing for the National Defense passed by Congress and approved June 3, 1916, and particularly under Sections 120 and 123 thereof". Such language *must* mean, unless very clearly explained to the contrary, that the Government was taking absolute control of 2,000,000 pounds of claimant's copper under and pursuant to the National Defense Act.

Outside of the explicit language of those orders, there are only two statements in the Findings concerning them (Finding VII, R. p. 11; Finding VIII, R. p. 12). In the first of these, after it is found that Eugene Meyer, Jr., was present at the meeting of September 28, 1917, at the request of the Commissioner of Raw Materials of the War Industries Board, and had with him such orders for 12,000,000 pounds of copper drawn up under the provisions of §§ 120 and 123 of the National Defense Act, which orders he distributed among the producers and *dealers* present, two for 1,000,000 pounds each to the claimant, the following sentence appears:—

"This was done at their request in order that said producers and dealers might be protected from suits for damages for breaches of their contracts with their private customers, and not because the

Government intended to procure copper under such orders" (Finding VII, R. p. 11).

The other of those two statements (Finding VIII, R. p. 12) reads:—

"It was understood and agreed between the producers and dealers in copper (including the plaintiff) and the United States that no copper would be required by the United States under the mandatory orders referred to in Finding No. VII, but that the 12,000,000 pounds of copper named in said requisitions would be obtained in the usual way through the contracts between the United States and the United Metals Selling Company, which were entered into from time to time, beginning with April 6, 1917."

Three conclusions become clear from a consideration of these statements, viz.;

(1) It is not found that the producers or dealers present at the meeting of September 28, 1917, ever requested or consented to the making of those orders, or asked Mr. Meyer to bring them to the meeting with him, or had anything whatever to do with their issuance by the Secretary of War before they were found at that meeting; but, finding them there in the form of absolute commands, together with the Government's insistence that all their copper must be held at its disposal (Motion, pp. 65-69), they then requested delivery of those orders to themselves, to the end that the mandates which were coming to them in any event might be used as protection when needed against their private customers.

Those orders could afford no such protection unless they were and remained commands from the Government. If as such commands they did not require claimant to

supply the copper to the Government in priority over all other contracts or claims, that fact could be shown by the private customers and recovery be had by them for consequent breach of their contracts with claimant.

Mawhinney v. Millbrook Woolen Mills, Inc., 234 N. Y. 244, 250;

Roxford Knitting Co. v. Moore & Tierney, 265 Fed. Rep. 177; s. c. 253 U. S. 498.

Moreover, it was only the *obtaining* of the copper—the method of actually getting it as thus commandeered—that was put through the United Metals Selling Company—it “would be obtained in the usual way through the contracts between the United States and the United Metals Selling Company, which were entered into from time to time, beginning with April 6, 1917”—the system of working out the *delivery* had thus been inaugurated nearly six months before the meeting of September 28, 1917, and was being perfected at that meeting; but the absolute requirement and mandate that, by that system, the copper must pass from claimant to the United States was left untouched by such an arrangement, and was manifested by the commandeering orders which thus also became effective against the private customers of the producers and dealers.

(2) It must have been intended that those commandeering orders should have and retain mandatory force; else the Government of the United States would have been colluding with these producers and dealers to defraud their private customers who had contracts with them for copper. If those two orders handed to claimant were nothing but forms, or were intended to become

nothing but forms, then they were also nothing but *shams*. They must have the effect of holding the 2,000,000 pounds of copper legally and conclusively away from the private customers and for the Government, or they must be used falsely and fraudulently to give that appearance. It is, of course, inconceivable that the Government of the United States could intend them to have the latter effect, or that Mr. Meyer taking them to the meeting as the Government's representative could intend that they should have that effect. It is a

"very general and very proper understanding that the Government will never knowingly do wrong and injustice to any of its citizens."

United States v. Raine-Andrews Lumber Co.,
262 Fed. Rep. 787, 801.

(3) The intention, as shown by Mr. Meyer himself, was that those commandeering orders should be mandatory—that, however the *delivery* of the copper might be worked out, they should stand as governmental commands unless some other arrangement was subsequently made. He testified as follows (Motion, pp. 64, 65):—

"71. Cross-question. As a layman Mr. Meyer, doesn't it occur to you that if there were no commandeering orders from the Government they could not and would not have that effect?

Answer. They were commandeering orders from the Government; there was no doubt as to their status; they would not have any effect at all if they were not commandeering orders. I never questioned those orders being commandeering orders. The orders were commandeering orders.

72. Cross-question. And they were orders which the persons to whom they were delivered would have

to obey unless some other arrangement was made?

Answer. Or unless some other understanding was entered into, or unless they were waived by the departments."

Thus those commandeering orders were essentially mandates. They were part and parcel of the Governmental control of all copper, whereby claimant was *compelled* to transfer and deliver to the United States the 12,542,857 pounds in question.

III.

The President and Government of the United States placed orders with claimant for the 12,542,857 pounds of copper, for fair and just compensation for which this action is brought.

The facts found by the Court below show this clearly. It would be confirmed and emphasized by a finding that claimant was *compelled* to deliver that copper to the United States. How the facts found show it may appear from a brief discussion of three propositions, viz.: (1) the commandeering orders outlined the method of controlling all copper, and acquiring it as far as necessary, by or for the United States, (2) the contracts with the United Metals Selling Company and their execution, through which the United States acquired essentially all of its copper during the war, show that such orders must have been so placed with the claimant, and (3) the agencies and procedure through which the United States acquired the copper point unmistakably to the placing of such orders.

(1)

It is shown by the Findings that the commandeering orders handed to claimant at the meeting of copper producers and dealers on September 28, 1917, not only had and retained the effect of absolute mandates, but also prepared the way for and outlined the method and procedure whereby the United States acquired its copper during the war.

Those commandeering orders were "signed by the Secretary of War and drawn up under the provisions of §§ 120 and 123 of the Act of June 3, 1916 (39 Stat., 213, 215), commonly known as the National Defense Act"; and they took precedence over all other orders and contracts (Finding VII, R. p. 11).

Logically and naturally, those commandeering orders in their own language indicated a method for their own fulfillment, viz.:

"Detailed shipping instructions affecting all of this material, or partial amounts aggregating the total involved, will be prepared and issued by the Gun Division, Ordnance Department, whose instructions you are to honor" (Finding VII, R. top p. 12).

In practice, those orders were issued in the usual way through the intervention of the United Metals Selling Company, and this method of procedure was followed when orders thereafter came to claimant. The only modification thereof which really occurred came about by the claimant's yielding, as a loyal citizen, to the urgent request of the Government's representative (Findings V-VII, R. pp. 8-12). That modification *in method* is described in the motion to remand (pp. 63-65), and cul-

minated as to claimant by its writing the following letter (Motion, p. 64):

"October 16, 1917.

Gun Division, Office of the Chief of Ordnance,
1330 F Street, Washington, D. C.

Dear Sirs: Referring to orders No. War-Ord-G, 574-312-S and No. War-Ord-G-575-313-S each of one million pounds of copper, dated September 27th, 1917, we are writing you upon request of the Copper Producers Committee that in view of the fact that we have received our shipping instructions from the United Metals Selling Co., and are going to bill the copper to them, we do not see any objection to your making the contract for the entire poundage, including our 2,000,000 lbs. with the United Metals Selling Co.

Yours, very truly,

L. VOGELSTEIN & Co., Inc."

We read further in those commandeering orders, "shipments will be made on Government bills of lading". Every shipment of copper made by claimant—in the procedure outlined by Finding IX (R. p. 17)—was on a Government bill of lading "forwarded with the order" sent by the Government to the United Metals Selling Company.

And finally the commandeering orders provide (R. p. 12):

"Invoices and correspondence regarding this order should be addressed 'Gun Division, Office of the Chief of Ordnance, 1330 F Street, Washington, D. C.'".

Such is the address of claimant's letter last above-quoted—manifestly written merely to adjust *procedure* in essentially obeying the orders placed with it by the

United States pursuant to §§120 and 123 of the National Defense Act.

Thus the very commandeering orders themselves indicated "the plan adopted for obtaining the copper by the Government" (Finding IX). Such orders, not being *intended* to be enforced except through that plan, were no longer essential after that plan itself, *with the compulsion of the United States back of it*, was perfected. The orders themselves were *indicia* of the governmental force back of that plan. When that force came to be exerted through the Government's control of *all* copper (unmistakably shown in the extracts from the report of the War Industries Board by Bernard M. Baruch its Chairman, a public document printed as an exhibit in claimant's motion to remand, pp. 36-40), then that plan of procedure plus the control thus back of it was effectual without any further commandeering orders. That plan of procedure, that method of placing the orders under §§ 120 and 123 of the National Defense Act was effected through the contracts with the United Metals Selling Company and the employment of all the agencies described by the Court below, especially in Findings IX-XIV thereof (R. pp. 17, 18).

(2)

The contracts between the United States and the United Metals Selling Company and their execution, through which the former acquired its copper during the war, show that the orders for claimant's copper were placed under and pursuant to § 120 of the National Defense Act.

Each of those contracts (Finding VIII, R. p. 12) was expressly made "under the provisions of § 120 of an Act

of Congress relating to National Defense, approved June 3, 1916". The fact that that step in the procedure, whereby the United States was controlling all copper and taking in priority all that it needed, assumed the form of an express contract does not militate against the further fact that, through that contract and its execution, *but under and by virtue of § 120 of the National Defense Act, the United States was placing orders with the claimant.*

The consequent position of the United Metals Selling Company, as merely an intermediary, is apparent from a consideration of that company itself, and of the part which it performed in the procurement of copper. "In its business, it confined itself almost exclusively to acting as sales agent for copper-producing companies" (Finding XII, R. p. 18). Therefore, while *in form* it contracted "to make and deliver to the United States" (R. top p. 13) all the vast quantities of copper required by the latter, it was well known that it must necessarily obtain the copper from producers and dealers throughout the country. It is shown by Finding X (R. p. 17) that, during the four months from September 28, 1917, to February 1, 1918, the United States procured through the United Metals Selling Company no less than 283,000,000 pounds of copper for war purposes. This *must* have been the result of the perfected machinery for reaching the real vendors of the copper, with whom the orders were being placed through that one agent.

The United Metals Selling Company's contracts with the United States show that it was to get large quantities of copper from other producers and dealers, and that it was a mere intermediary. Especially this appears as follows:

It got its detailed shipping instructions from the Gun Division, Ordnance Department, in the same manner as was provided in the commandeering orders (Finding VIII, R. p. 16; Finding VII, R. p. 12):

It was required to make personally, in form, every subcontract; but must insert therein a statement "that it relates to a 'main contract' between the contractor and the United States" (Finding VIII, R. p. 15)—even though it contracted expressly with an ultimate producer, it must make its intermediate agency apparent in the very terms of such *subcontract*. It was not in any sense an independent contracting party free to acquire and supply the copper as it might choose:

Page 13 of the transcript of record is replete with evidences of the intermediate agency of the United Metals Selling Co. The fetching of the copper "from refineries *in the interior of the United States*", where manifestly the contractor itself had no refineries; the requirement that the copper should be supplied "in regular commercial shapes * * * *in accordance with the schedule of the several refineries*", and the provision that for extra heavy cakes "the contractor will be paid for extra charge applying thereto in the *particular plant* furnishing copper in such shapes" emphasize the same conclusion. The further provision that "the performance of this contract shall have preference over all *work* for parties other than the United States" shows that in reality it was a *service*, and not a selling of its own material, for which the United Metals Selling Company was employed by the United States.

(3)

The agencies and procedure, through which the United States acquired the copper, point unmistakably to the placing of orders with claimant.

All copper, which in form the United Metals Selling Company ordered from claimant, was for the Government (Finding IX, R. top p. 17). It was all ordered on Government bills of lading. The order was allocated to claimant by the Copper Producers' Committee (Finding IX, R. p. 17). It went forward in continuation of the Government's command under § 120 of the National Defense Act (R. bottom p. 12). It is inconceivable that the United States Government, reaching out as it was doing and had to do for practically all of the copper in the country and having absolute control of every pound thereof (Baruch's report, *supra*), was not in substance and in all fairness and reality placing *its own orders* with the ultimate producers and dealers from whom that copper came.

In so placing its own orders, the United States was doing, with respect to copper, the same as it was necessarily doing with respect to many other commodities, viz.; it was employing, and acting through, numerous and co-related agents and representatives. These were (Findings XII, XIII, XIV, R. pp. 18, 19) in addition to its War and Navy Departments, the Council of National Defense and its subordinate body the War Industries Board, the Copper Producers' Committee, the United Metals Selling Company, and the individuals such as Bernard M. Baruch, Eugene Meyer, Jr., and Hamilton Brush the Secretary of said Committee. The machinery which employed these parts or factors, no inferior one of which alone may ever have placed any mandatory

order with claimant (Findings XIII, XIV, R. pp. 18, 19), was built up and operated for the one fundamental purpose—to carry the Government's order (directly or indirectly) to the ultimate producer or dealer, possessing the copper so much needed. It was machinery essentially the same as that which operated, with respect to underwear for soldiers, in the case of *Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 Fed. Rep. 177, where the Court refused to countenance the losing of responsibility among so many factors, and found them all used and working together in the process of Governmental placing of orders.

No such system or machinery could possibly have operated to produce the required copper, if there had not been an irresistible force compelling the producers and dealers to honor the orders which came to them, *in form* from the United Metals Selling Company, but *in substance* from the United States. They would have done as they pleased about supplying copper, if there had been no absolute, governmental requirement.

IV.

Claimant was compelled by the United States to transfer and deliver to or for it the 12,542,857 pounds of copper.

This was effected through the plan and method of acquiring copper heretofore discussed (Findings IX-XI, R. pp. 17, 18) plus the absolute control of all copper by the Government. As stated above, this perfected control did away with the necessity for *formal* commandeering orders.

The National Defense Act, so broad and comprehen-

sive in its own terms, was followed by various supplementary and enabling statutes. All hampering restrictions were superseded by such laws, giving to the Executive powers of the broadest possible character with regard to the manner of taking and using raw materials, industries and their products for war purposes. The usual methods of advertising for bids and other formalities were swept aside, and procedure was wholly subordinated to results. (See especially War Department General Order No. 49, dated April 12, 1917.) It may be properly said that the entire industrial resources of the country were in effect commandeered to meet the paramount requirements of the Nation. The President's appreciation of these unprecedented powers is shown by their brief recital in the commandeering orders themselves (Finding VII, R. pp. 11, 12).

The Court below was requested to make an explicit finding with respect to the consequent control of all copper, and the compulsion thus brought against claimant; and that request was urgently repeated in the motion for a new trial. Since that Court made no finding directly as to such control and compulsion—certainly a pivotal question in this case—this Court may find it necessary to remand for further findings (See Motion, pp. 3, 4).

The Findings made by the Court below, however, do point very clearly to such absolute control and compulsion.

This may briefly appear as follows:—

Such control and compulsion, at least as to 2,000,000 pounds of claimant's copper, appear in the formal commandeering orders (Finding VII, R. pp. 11, 12).

Such control and consequent compulsion are shown absolutely and necessarily to have existed, in the "usual way" (first sentence Finding VIII, R. p. 12) adopted and effectually carried out in acquiring *all* copper by the United States through one central agency, the United Metals Selling Company.

The contracts with the United Metals Selling Company were all made pursuant to §120 of the National Defense Act (Finding VIII, R. p. 12). That fact presupposed the use, if necessary, of the force and penalties described by that section (R. p. 2). It is practically unthinkable that the Government put the United Metals Selling Company, only a "sales agent for copper-producing companies" (Finding XII, R. p. 18), in such a position without supplying the means, the control of all copper, whereby the stupendous war demands could be met.

The control and compulsion appeared in the Government's bills of lading, and in the care with which they were numbered and described, and the contracts with the United Metals Selling Company were designated (Finding VII, R. p. 12). This was done under the plan set forth in Findings "IX"- "XI" (R. pp. 17, 18). These things could not rationally have occurred, except as parts of a method of compulsion.

At the meeting of September 28, 1917, the United States acted by and through Eugene Meyer, Jr., in its demand for the immediate delivery of 12,000,000 pounds of copper, and for the dominating control of all other copper in the country (Finding VI, R. p. 10). This was done to perfect the plan or method of procurement begun as early as April 6, 1917 (first sentence Finding VIII, R. p. 12). It cannot fairly be said that, after that meeting, any copper in the country was outside of absolute governmental control.

The meeting of September 28, 1917 was called by the War Industries Board, which acted for the Government (Finding VI, R. pp. 9-11). While that board did not have power to bind the Government by express contract (Findings XIII, XIV, R. pp. 18, 19), it certainly did have power to represent the United States in this important step of perfecting control of all copper; and it was aided at said meeting by Mr. Meyer, who came also as a direct representative of the Secretary of War and carried from him the commandeering orders.

A careful study of page 10 of the record, which sets forth the minutes of the meeting of September 28, 1917, can leave little question but that the purpose and effect of that meeting was to cement and complete the Government's control of all the copper in the country.

How control of copper began in the early part of 1917, and culminated in the meeting of September 28 of that year is fully explained by Bernard M. Baruch in his Report, as Chairman of the War Industries Board, to the President of the United States at his request—a public Government document published March 21, 1921, and entitled “American Industry in the War”. The following extracts from that report are very pertinent:—

(p. 36) “It is the purpose of this book to tell how and why the principal features of direction and *control* were inaugurated in respect to the great body of our industries.”

(p. 37) “A new method of *control* was to be invented here, a method by which one body of officials would sit in judgment to determine the sequence in which materials should be manufactured and orders filled.”

(p. 39) “The fixing of copper prices, as was the

case of steel, brought with it the necessity of control in other directions. *Control* over the distribution of copper was far less difficult than that of steel. While civilian uses of copper are very numerous and very important, they are not nearly so indispensable, particularly for a short period, as those of iron and steel. The war required over 90 per cent of the copper which we could produce."

(p. 40) "The principal responsibility of the Board, after the market had once been stabilized, was to watch over production and take care that it was not diminished; to guard against speculation; and to keep the small producers encouraged to continue their furnaces. *The Copper Producers' Committee, at the direction of the Board, allocated the various orders.*" (Italics ours).

The efficient agent of the Government, whose acts heralded the completion of that process of control at the meeting of September 28, 1917, was Eugene Meyer, Jr. *He there spoke for the United States, and showed what the result of the governmental reaching out for control of all copper had become.* The following brief extracts from the uncontradicted testimony concerning that meeting (Motion, pp. 65-68) show how conclusive his language was.

T. Wolfson, Vice-President of United Metals Selling Co.:—

(p. 65) "And he further said 'Anyone that is not willing to do that I am prepared to go to the limit of commandeering, and in fact I have brought with me commandeering orders anyway', and some of them expressed themselves as very well pleased that he did bring commandeering orders, because that would relieve some of them of certain obligations and others said, 'Well, of course, if the copper is

commandeered we can not help ourselves,' and it was then, after some discussion, decided to form a committee."

(p. 66) "I believe I have already testified to that, that he explained the emergency and told the producers that he was prepared to go to the limit to get all the copper that the United States Government and the allied governments required."

(p. 67) "Mr. Meyer showed the commandeering orders, and my recollection is that he stated that if the orders were not voluntarily accepted by the producers there present, that the copper would be immediately commandeered under those orders which he had."

L. Vogelstein also testified:

(p. 68) "As a matter of fact we were threatened, if we would sell it that all our copper and all our contracts would be commandeered."

It thus appears that claimant's copper (12,542,857 pounds) was taken and used for war purposes by the United States, acting through these various agencies, and in substance under direct statutory authority. *Since its property was so taken and forced from it pursuant to orders placed with it under §§ 120 and 123 of the National Defense Act, it should recover fair and just compensation.*

National Defense Act of June 3, 1916, (Public No. 85; 39 Stat. 166, 213, c. 134);

Roxford Knitting Co. v. Moore & Tierney, Inc., 265 Fed. Rep. 177;

Attorney General v. DeKeyser's Royal Hotel (1920) A. C. 508, 540, 556.

These authorities sustain the logical and only just conclusion that, when a citizen's property is required for war purposes, and an order reaches him through any *media* whatever, and he is compelled by governmental control of that property to deliver it for that purpose, he is essentially in the position of one whose property has been commandeered and is entitled to fair and just compensation therefor.

When the United States acquired control of all copper, the effective commandeering of it was initiate: when the United States took claimant's copper thus controlled, the effective commandeering thereof was consummate.

Finding of Fact XIV (R. pp. 18, 19) is without bearing in the circumstances of this case. It has never been contended that any order for copper was placed with claimant by either the Council of National Defense or the War Industries Board. Under the provisions of Section 120 of the National Defense Act, neither of these bodies was possessed of commandeering or contractual powers. All orders for the coppers here in question were placed by the Secretaries of War and Navy respectively acting for and under direction of the President of the United States through their intermediate agency the United Metals Selling Company. In view of this unquestioned fact, Finding XIV is immaterial.

V.

Claimant duly protested against the price of 23 ½ cents per pound for said 12,542,857 pounds of copper, and insisted on its right to receive 26.881977 cents per pound. It has never waived or relinquished that right.

The only finding by the Court below respecting this matter—made after setting forth the minutes of the meeting of September 28, 1917—is as follows (Finding VI, R. top of p. 11):—

“The plaintiff was present at this meeting and placed in nomination the persons who were elected members of the Producers’ Committee. He raised no objection at this meeting to furnishing copper at the price fixed in the agreement between the producers and the War Industries Board and approved by the President on September 21, 1917”.

There was no cause for plaintiff to make any protest at the meeting of September 28, 1917. The negative statement embraced in the above finding simply leaves the questions open as to whether or not it ever did protest with respect to its compensation for the 12,542,857 pounds of copper, and if so, when, and in what manner.

The Court below was asked, both in the original requests and in the motion for a new trial, to make a finding on this matter (Motion, pp. 3, 4, 28, 29, 32). Its failure to do so may call for a remanding of the case, to obtain such finding.

It was found below, as to claimant:—

“It is not a mine owner, operator, producer or refiner, but a dealer only in ores, minerals and metals”. (Finding II, R. p. 7).

Not being a "producer", it was not called to the conference of September 21, 1917, at which the Government's price of 23½ cents per pound was fixed; and it had nothing whatever to do with that fixing (Finding V, R. pp. 8 and 9).

There is nothing whatever to show that at the meeting of September 28, 1917, that price was mentioned, or that anything was done or said that should have called forth any protest (Finding VI, R. pp. 9-11). True, the commandeering orders handed to claimant's representative at that meeting stated that the price would be 23½ cents per pound, "in accordance with the adoption of a fixed price for copper by the President of the United States" (Finding VII, R. p. 12). But apparently there was no discussion of the price, the purpose of that meeting was not to consider any price but to arrange for an allocating copper producers' committee and its services, and claimant had already begun its protests as to that price and continued them persistently thereafter.

Beginning the day before that meeting, September 27, 1917, when Mr. Vogelstein vigorously protested to Eugene Meyer, Jr. (the Government's representative), claimant's protests and insistence against a possible loss on that copper were clear and emphatic (Motion, pp. 3, 4; 54-61).

Mr. Vogelstein testified, without contradiction, as to his conference with Mr. Meyer on September 27, 1917 (Motion, top p. 55):—

"I told Mr. Meyer in short words that we had not been consulted in fixing it" (meaning the price of 23½ cents) "and that we considered it monstrous that we should be called upon to deliver copper for less money than what it cost us; that the loss which

we would incur would run into hundreds of thousands of dollars; and that we would not stand for such loss."

And further:—

"Mr. Vogelstein, was there prepared by you and Mr. Todd and sent to the Raw Materials Division of the War Industries Board of the Council of National Defense under date of November 15, 1917, an argument and statement regarding the 23½ cents per pound?

Answer. Yes." (Motion, bottom of p. 57).

Mr. Reeves, another member of claimant's attorneys, went soon thereafter and presented in person a formal protest to the War Industries Board (Motion, p. 58).

Under date of October 8, 1917, claimant wrote and sent to Bernard M. Baruch, "Commissioner Raw Materials Division of the War Industries Board of the Council of National Defense", a letter of protest with respect to that price for that particular copper. And on November 15, 1917, it wrote and sent a similar protest, directed generally to the Raw Materials Division of the War Industries Board of the Council of National Defense (Motion, pp. 59-61).

Claimant accordingly, instead of waiving any of its rights, presented full and complete protests as to receiving only 23½ cents per pound for the copper which had actually cost it 26.881977 cents per pound. There was no obligation upon claimant to go further and *resist* the taking by the United States. It was sufficient that it made clear its protest against receiving less than fair and just compensation.

Claimant's acquiescence in the procurement scheme

had no relation to the question of compensation; and on this point the above-quoted evidence is uncontradicted, and affords ample basis for findings as to the various timely protests on the question of price (Motion, p. 5).

Roxford Knitting Co. v. Moore & Tierney, 265 Fed. Rep. 177, 183;
Attorney-General v. DeKeyser's Royal Hotel (1920), A. C. 508, 531, 540.

Thus claimant comes within the requirement recently stated by this Court (Mr. Justice Holmes writing) with respect to the claim of the American Smelting & Refining Company:—

“But if it had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary, so far as appears, was willing to contract and was content in the main with what was offered.”

American Smelting & Refining Co. v. United States, 258 U. S. —. (No. 221 October Term, 1921, decided May 15, 1922.)

Claimant was not willing to contract nor content with what was offered. It did save the question of the price. It made its position unmistakable by protests which could not be misunderstood. It is entitled to findings on this matter by the Court below; and, if this Court deems such findings necessary to a decision, the case should be remanded for that purpose.

VI.

The necessary cost to claimant of said 12,542,857 pounds of copper was 26.881977 cents per pound.

Findings III and IV show this to be true (R. p. 8). Finding III shows that, of the 43,851,042 pounds of copper which claimant had on hand at the close of business September 20, 1917, 34,687,579 pounds were purchased *under long-term contracts*, which otherwise unexplained means they were necessarily purchased; and it is to be assumed, because there is no finding to the contrary, that claimant's business just as necessarily demanded the purchase of the other 9,163,463 pounds in the open market. When Finding III further states that the cost of the entire mass was \$11,788,027.17, the average cost per pound becomes a mere matter of division—26.881977 cents per pound.

No finding (such as that numbered IV, R. p. 8) was needed to the effect that claimant could not identify specific purchased lots of copper with specific sold lots. Of course it could not do so. The Court will judicially notice that the identity of specific portions of large masses of bulk copper in the rough (as ore or matte) is lost in the processes of smelting and refining, just as the identity of bags of grain is lost in grinding it together with other quantities of the same material. Such facts are matters of common knowledge.

Phillips v. Detroit, 111 U. S. 604, 606;

King v. Gallun, 109 U. S. 99;

State v. Bodden, 165 Wis. 75, 80; s. c. 160 N. W. Rep. 1077.

The findings also show that it was the action of the Government, in fixing the price of copper at 23½ cents,

to go into effect on September 21, 1917, which caused claimant to have on hand and unsold the 12,542,857 pounds of copper at the close of business on September 20, 1917. While the fixing of that price was by agreement "between the producers of copper and the Government" (Finding III, R. p. 8), yet it became a governmental act binding on all dealers of copper (Findings V, VI, R. pp. 8, 9, 10); it was adopted as "a fixed price for copper by the President of the United States" (Finding VII, R. p. 12); and it was owing to the well-known imminence of that act that claimant was unable to sell all its copper, even at the price, less than its average cost, at which most of it had been sold, by the end of September 20, 1917 (Finding III, R. p. 8).

The negotiations and proceedings leading up to the governmental fixing of $23\frac{1}{2}$ cents as the price of copper were between the *producers* of copper and the United States. *Claimant was not a producer, but only a dealer* (Finding II, R. p. 7). It had nothing to do with the fixing of the price.

The determination of the cost per pound to claimant, by finding the *average* cost of the entire 43,851,042 pounds, was not only the one feasible method, but it was also the method generally adopted and applied by the courts. Thus, where large quantities of the same kinds of goods or merchandise have been commingled and a partial loss or partial disposition thereof occurs, there is uniformly a *pro rata* distribution, an averaging, to determine the loss, or price, per unit. It is that principle and practice, for example, which is applied under the rule of general average in case of losses at sea.

Beattie v. New York & Long Island Construction Co., 196 N. Y. 346, 355;

Nelson v. Belmont, 21 N. Y., 36, 38, 39;
The Idaho, 93 U. S. 575, 585;
Dows v. Eckstrone, 3 Fed. Rep. 19;
*Jennings-Heywood Oil Syndicate v. Houssiere-
 Latreille Co.*, 127 La. 971, 998.

If there should be an uncertainty from the existing findings respecting the foregoing matters, and especially if it should still be questionable whether or not claimant *unavoidably* had the 12,542,857 pounds on hand and unsold, the case should be remanded for a specific finding on that point. Its having that quantity on hand at the close of business on September 20, 1917, was unavoidable, as is proved by the uncontradicted testimony of Mr. Vogelstein (Motion, pp. 41-49). He there shows that claimant bought no more copper in the year 1917 than it was absolutely required to buy pursuant to its long-term contracts, which antedated the entrance of the United States into the war; and he also shows that in that year down to September 21, it sold every pound of copper that it possibly could sell.

VII.

Claimant is entitled to be paid, for all of the 12,542,857 pounds of copper, the necessary cost price to it, 26.881977 cents per pound.

The minimum value of that copper, the fair and just compensation to which claimant is entitled is its necessary cost. There being no finding or evidence that for any reason it was worth more or less to claimant, and there being no market price other than that fixed by the Government's fiat, its cost is taken as its settled value.

Wilcox v. Consolidated Gas Co., 212 U. S. 19, 42;
Masterton v. Mayor of Brooklyn, 7 Hill (N. Y.),
 61;

United States v. Speed, 8 Wall. 77, 85;

Hinckley v. Pittsburgh Bessemer Steel Co., 121
 U. S. 264, 274;

United States v. Behan, 110 U. S. 338, 344;

Guerini Stone Co. v. Carlin, 240 U. S. 264; 280;

Newcastle Breweries, Lim. v. Regem, (1920) 1
 K. B. 392.

In the first-cited of these cases, this Court said (212 U. S. 42):—

“The value of real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate *when not based upon the actual cost of material and construction*”. (Italics ours).

Thus the actual cost was clearly recognized as the *prima facie* criterion of value—of fair and just compensation—in such cases as that now at bar.

In *Masterton v. Mayor of Brooklyn*, 7 Hill (N. Y.), 61, it was decided that the normal measure of damages on default of a contractual vendee of goods to be manufactured is the difference between the cost of their manufacture and the contract price. This Court has spoken of that case as leading (*United States v. Speed*, 8 Wall. 77, 85), and in its other decisions here cited has followed that criterion as to damages. The Court of Appeals of New York has done the same.

Oswego Falls Co. v. Stecher Lith. Co., 215 N. Y.
 98, 105.

The cost of production is the fair and just value of such property to its manufacturer or owner; and his fair profit is the difference between the cost and a contract price.

Claimant's situation with respect to the 12,542,857 pounds of copper involved in this action was unique. The prevailing market price at which it was compelled by its long-term contracts to take that copper was higher (26.881977 cents per pound) than was the *fiat* price of the Government when fixed. Therefore the producing vendors under those contracts forced that copper at that higher price on claimant. *This would not have been done but for the imminence of the governmental fixing of price.* It would not be fair or just for the power which thus compelled claimant to have that copper at that higher cost to take *that copper* at less than that cost. All the residue of claimant's copper taken by the Government during the War—and there were upwards of fifty million pounds so taken—was acquired by claimant and willingly supplied to the United States at its fiat price.

It is respectfully submitted that the statement at the end of Finding III, "after September 20, 1917, the market price of copper was 23½ cents per pound," is either misleading, or must be read as referring to the mere *fiat* price fixed by the Government (Finding V, R. pp. 8, 9). It certainly could not mean the ordinary market price as fixed by supply and demand and all the other elements involved in normal trading in copper. Assuredly this Court will give the only possible fair meaning that it can have when read in the light of the other findings and the well known facts.

If it should be argued that uncertainty as to the average cost exists, because in theory it is possible that some

small quantity of copper which ought to have been included in claimant's computation of cost price was not so included, the conclusive answer is that it is sufficient in such cases that practical accuracy in the computation is shown.

Hetzel v. Baltimore & Ohio R. Co., 169 U. S. 26, 37;

Johnson & Higgins v. Harper Transportation Co., 228 Fed. Rep. 730, 743;

United States Trust Co. v. O'Brien, 143 N. Y. 284, 288;

Critchfield v. Julia, 147 Fed. Rep. 65, 71, 73;

Corpus Juris, Vol. 17, pp. 759-763 *et seq.*

The rules as to certainty in such cases were well expressed by Mr. Justice Peckham, before his call from New York to this Court, in *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 288, as follows:—

“In using the words ‘certainty, speculative and contingent’, for the purpose of excluding that kind of damage, it is not meant to ascertain that the loss sustained must be proved with the certainty of a mathematical demonstration. • • • Certainty to a reasonable extent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof.”

If A owns one thousand bushels of wheat, all alike, and sells two hundred of them at cost price, he properly ascertains that price per bushel by dividing the total cost of the entire mass by one thousand, even though he

may have acquired the whole in smaller lots, at different times and at varying costs per bushel. There is no other way to do it after his purchased lots are inextricably mingled.

Hurff v. Hiers, 11 Vroom (N. J.) 581;

Kimberly v. Patchin, 19 N. Y. 330;

Foot v. Marsh, 51 N. Y. 288.

The plaintiff had a large mass of copper, 43,851,042 pounds, composed of many smaller quantities acquired through dominating purchase contracts, all inextricably commingled in passing through smelter and refinery. The logical, normal and only practical way of finding the cost of any one of these pounds is by dividing the total cost by the total number of pounds—by average.

Conclusion.

It is respectfully submitted that the judgment of the Court below should be reversed, and judgment ordered in favor of the claimant as prayed for in the petition; or, if deemed necessary to a proper determination of this appeal, that the case should be remanded to the Court of Claims for further findings as requested in appellant's motion for such relief.

Dated, January 20, 1923.

Respectfully submitted,

ALFRED G. REEVES,
FREDERIC D. MCKENNEY,
RUSSELL H. ROBBINS,
Attorneys for Appellant.